First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

MARCH 1977 VOL. 2, NO. 7

The Government Informer: A Threat to Political Freedom

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As official investigations and court cases are slowly pulling the cover from off the FBI's covert operations of the 1960s and early 1970s, the role of the government informer looms larger and more unsavory. Only a short time ago, few people would have believed the sorts of activities that the government was paying informers to do to legitimate political groups.

But the present record of informer operations points to the difficult conclusion that the hand of the secret agent was responsible for a great deal of the political conflict of the last decade and a half. Much of the unrest was encouraged, if not actually incited, by FBI agents or their state and local police counterparts. The Black Panthers, for instance, started out as a self-help operation, and FBI agents provocateur had no small part in supplying the tactics and the weapons of violence which went into the jailing of the party's leaders and discrediting their reputation.

When we look at the civil rights movement, the FBI was carrying out two separate operations, one illegitimate and one legitimate, with its informers. While it was actively undermining the movement's non-violent leader, encouraging the violent political elements, and involved in attacks on civil rights workers, the FBI informer was also the wedge that brought the Ku Klux Klan's terrorist operations into criminal courts.

There are on record, then, examples both of how the informant program ran amok doing things which were indefensible from the beginning, and of how they also managed to go out of whack while doing something which was an appropriate function. The fact that, even at their best, informers have been a mixed blessing should not be surprising — there have been virtually no legal controls on how the FBI or state and local agencies use their paid informers.

Nor is the informer problem one that is safely buried in the past. There are no reassuring signs that the Justice Department has shifted its attitude about the way that informers should be regulated. Nor does the most recent Supreme Court decision dealing with informers, handed down just this month, give much cause for hoping that the Nixon/Burger Court has learned the political lessons of recent years and will apply the protec-

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

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tions of the Bill of Rights to controlling government agents.

The situation is serious, and we now need to start designing serious remedies which can cope with serious problems.

The Record Against Informers

There is a long list of horror stories which could be used to begin a discussion of informers. Only a few are mentioned here in order to demonstrate how serious a problem of informers in political groups has proven itself.

- Informers have taken part in operations which have resulted in violence and killings.
- Acting as agents provocateur, informers have supplied dangerous weapons (guns, bazookas, explosives) and illegal plots in order to set people up for criminal charges (*e.g.*, the raid on the Camden draft board, and the Weatherpeople's Days of Rage in Chicago).
- Informers have taken part in violence (*e.g.*, the beating of Freedom Riders by the KKK).
- Informers have watched violence take place while doing nothing to stop it (*e.g.*, the shooting of an anti-war activist in San Diego).
- Informers have set people up for political assassination (*e.g.*, Fred Hampton and Mark Clark, Black Panther Party leaders).
- Informers have committed burglaries and other crimes on behalf of the government, (*e.g.*, Timothy Redfearn and the SWP).
- Informers have committed burglaries and other crimes on their own behalf and then used their status as government informers as a bargaining chip to evade their legal problems (Redfearn).
- Informers have distorted the political process in legitimate political groups across the political spectrum by joining en masse and voting according to the FBI's preferences.
- Informers have worked to turn group policy toward violence and self-destructive actions.
- Informers have reached leadership positions in organizations, and ushered the organizations into a decline (*e.g.*, Organization for a Better Austin in Chicago and the Norman, Oklahoma chapter of the SWP).
- Informers have sown dissension in groups by such tactics as making false accusations about other people's loyalty; stealing files, lists, money; trying to ruin marriages; spreading rumors.

It is important to realize several things. First, that not all these activities were carried out by the FBI; state and local police have also run political informer programs. And second, these tactics have been used both against legitimate political groups and against groups whose flirtations with crime were inspired by FBI agents.

Informers: An Unreliable Source of Information

There is an additional question with informers beyond the list of improper activities. Would informers as an investigative technique survive a cost-benefit analysis? Apparently, one has never been done. Government spokespersons consistently make assertions which seem to fly in the face of the established record about the usefulness of their informers. They speak at length about how invaluable their informants are, but from every other quarter informer reports are faulted for their inaccuracy and irrelevance. The Church Committee Report, for example, described the informer as a "vacuum cleaner,"[1] mindlessly picking up all details, whether relevant or not.

The system for paying informers contributes to this. Although the FBI prefers to discuss its informants as if they were all public spirited citizens, the fact is that most do it for the money. Since informers are paid according to the amount and kind of information they bring in, the system contains an incentive to exaggerate their reports, or even, as some have admitted, to creating them out of whole cloth.

Second, there are bureaucratic incentives behind the vacuum cleaner effect. Success is measured by quantity of information, not by accuracy, relevance, or whether it was ethically gathered. Indeed, there is no reason to assume that the Bureau, any more than the informer, has any incentive to weigh in First Amendment and privacy issues.

And finally, there is the repeatedly documented preference in the FBI for information that is damaging as opposed to accurate. The Ghetto Information Program, for instance, was set up with the idea that its agents should be "listening posts" for what was going on in the ghetto. This however, went against the grain of the Bureau's usual interests, and ultimately the FBI Inspection Division criticized the program for paying its informers for reporting "negative information", i.e., that there was no indication of civil unrest in their area. The Inspection Division observed that "negative information is not counted as positive information in any other informant program."[2]

There are at present no safeguards against the mess of unreliable information which informers feed into the government files and which is ultimately disseminated widely. Unless one manages to wring the files from the government in a major court action such as the *Socialist Workers Party* suit (discussed below), there is no way to review the information for accuracy. Under the provisions of both the Freedom of Information and the Privacy Acts, information which comes from a confidential source is exempt from disclosure; that includes paid informers.

The threat to the public is compounded by the fact that the record shows that many, if not most informers are disreputable and/or unstable people. Such types happen to be, historically, the easiest sort to recruit; well-balanced people will balk at the idea of betraying the trust of the people around them. There is no guarantee that your dossier is being compiled by a person with good judgment, much less good intentions. Informers have had reasons to cooperate with the FBI at doing whatever was asked. Often getting paid has been the least of the incentives. Informers have received such benefits as release from jail, dropping of criminal charges, draft deferments, immunity from prosecution and harassment, and help

with naturalization problems. But these incentives are not merely bribes — often there is an implied or explicit threat that the prospective informer will be in more trouble if he or she does not cooperate.

Informers are inefficient in other ways. Because they are so unreliable, there is reason to use a great many of them. Sometimes there are so many agents that much of their activity consists of reporting on each other. For instance, in 1962 the FBI had infiltrated the Communist Party USA at a ratio of one agent for every 5.7 members.

Informers — A Dangerous Intrusion

But one should not be lulled into a false comfort at the visions of the FBI foundering among its ocean of inaccurate and irrelevant files. For although informants have proven generally inept at some things, in other ways they have been entirely too effective, Informers are not a passive intrusion into a political group. Even if they do not steal things, engage in disruptive tactics, or encourage violence, they still vote and influence the direction the organization takes. Yet there are virtually no legal controls on their activities. The Supreme Court has thus far held that the protections in the Constitution do not apply to informers; Congress has passed no statutes which would put controls on them; and the internal regulations of the executive branch are there more for the sake of form than actually regulating.

There has somehow arisen a belief that informers are not a violation of privacy in the way that a burglary, a bug, or a wiretap is. Yet it seems clear from the record that the informer is a far more dangerous intrusion, and one which catches people unawares. Wiretapping is well publicized and, after all, the phone is a machine, not a person, nor can a tap or a bug ask leading questions. And everyone who locks the door behind them is recognizing that burglary is a fact of life. But there are few people who think daily that those closest to them are in the process of spying on them for the government or trying to lead them into committing a crime in order to profit from their arrest.

This attitude, that "informers" are an investigative technique which doesn't require the kind of regulation that wiretapping does, has been advocated by successive administrations and accepted so far by the courts and Congress. For instance, in its report on the Omnibus Crime Control and Safe Streets Act, the Senate Judiciary Committee stated that "normal investigative techniques," which include "the infiltration of conspiratorial groups by undercover agents or informants," would have to be tried before the government could properly resort to wiretapping under the provisions of the Act.[3] It does not take into account that the government can and does infiltrate a legitimate group, generates a "conspiracy," and then installs its taps.

One partial explanation of this legal position is that until recently the informer question only came up in criminal rather than political investigations, and there has been no sense of the havoc that this could play against the law abiding but controversial. The record which has now been established leads to the conclusion that controlling political activities was at least as important a focus as controlling crime. As the papers stolen from the Media, Pennsylvania FBI office showed, the reason for infiltrating the war resistance and black organizations was to chill First Amendment rights — to "enhance the paranoia endemic in these circles and further serve to get the point across that there is an FBI agent behind every mailbox."[4] When documents show that the purpose behind FBI activities was to "expose, disrupt, and otherwise neutralize" political groups according to the tastes of the FBI, it becomes clear that this "normal investigative technique" is far from innocuous.

Government-Created Violence

The charge that the informant program was intended to ride roughshod over the First Amendment of the Constitution is serious indeed, but perhaps the most serious objections are that the way that the government has used informants has produced the very kinds of political upheaval that the FBI and Justice Department publicly offer as the justification for their existence. Terrorism is a serious issue in any society, but the FBI has made no responsible effort to separate out phony terror (where agents concoct or exaggerate a threat) from the real thing, or to recognize its own part in provoking violence.

The FBI further confuses public thinking on the issue by lumping together intelligence investigations (non-criminal) and criminal investigations. The Bureau emphasizes its legitimate role in fighting crime, but then apparently turns around and invests the resources of its informer program most heavily in the non-criminal, intelligence investigations of political groups. The FBI budget for Fiscal Year 1976, for example, allocated $7,401,000 for the intelligence informant program — more than twice the sum going into the organized crime informant program.[5]

The irony of a former FBI informant named Sara Jane Moore surfacing as an attempted presidential assassin was played in the press as an extraordinary fluke, and she as a ludicrous, dowdy, rampaging, unstable housewife. But is there a more serious lesson to be drawn? As one commentator observed:

> Violence inevitably stems from a police system that recruits (and educates) secret informers and provocateurs within a radical movement. The recruited agent, almost by definition, is an unstable, psychotic, or psychopathic individual. His temptation to improve his status by engaging in or encouraging violence is almost irresistable. This is what touches off the fatal chain reaction. Violence feeds on violence and the question of who is informer, who is terrorist, becomes confused beyond comprehension even by the individuals involved.[6]

Such institutions as the informer, given authority to war on "dissension and violence" can come full circle in unexpected ways.

The Agent Provocateur — A Case Study

William O'Neal, the FBI informer who apparently set Black Panther leader Fred Hampton up to be shot,[7] provides a documented study of a classic agent provocateur arrangement. The story as it is still unfolding in the *Hampton* law suit demonstrates how a police system without controls on it can begin with a simple authorization to protect the body politic from terrorist threats, then moves too easily into generating terror in order to justify its operations, and ultimately into using the tactics of terror.

In addition, it provides the clear and extreme (but not unique) example that any system of remedies must address. While the Church Committee witnesses do not portray the FBI's handling of its informants in a very flattering light, these witnesses each had their redeeming virtues. Mary Jo Cook was an informer who, while paid, was public spirited and quit for reasons of conscience. Gary Rowe, although he proved that you "couldn't be an angel and be a good informant,"[8] did surface and testify against the murderers of civil rights worker Violet Liuzzo.

By contrast, the FBI's apparent use of O'Neal as an informer demonstrates that simply exhorting agents to start playing fair is a rather pale response when the stakes in the game are people's lives. The facts of the O'Neal situation also provide a current demonstration that public embarrassments will not by themselves shake the government's commitment to the worst abuses of the agent provocateur.

O'Neal's beginning as one of the Bureau's most highly paid informants began, as a great many of them do, when an FBI agent recruited him while he was in jail. Intelligent and agressive he joined the Black Panther Party and rapidly rose to be the Chicago BPP's Chief of Security. It is an appropriate irony as Chief of Security his major interest was in ferreting out informers. To this end, he constructed an electric chair (which Hampton then ordered dismantled), organized groups to carry out robberies (and accused those who didn't want to take part of being informants), wrote articles in the BPP newspaper denouncing various people as being informers, and used a bull whip on "suspected" informers. He also provided explosives to Panthers and arranged for their arrests, and he formulated a plan to send a model airplane loaded with a bomb flying into City Hall. The FBI files in the *Hampton* suit show that the FBI was pleased with his activities.

In the latter half of 1969, O'Neal started pressing Hampton and the BPP for a more militant stance and they began to suspect that he was a provocateur. However, he was still able to provide the FBI with a diagram of Fred Hampton's apartment, showing where Hampton slept, and he was, apparently, also able to drug Hampton the night of the raid. And it was O'Neal's report about weapons (which were known to be legal) in the apartment which provided the pretext for the warrant for the raid.

O'Neal surfaced as a witness in the trial of two Chicago policemen, Stanley Robinson and William Tolliver, accused of running an extortion-murder operation. This case is unresolved, but throws more suspicion on the character of O'Neal's work for the FBI. First, there is Robinson's claim that he is the victim of an elaborate frame-up by the FBI because of his knowledge of FBI collusion in the 1969 raid that killed Hampton. And second, newly developed ballistics tests have revealed that the weapon which O'Neal testified he saw Robinson shoot a man with was not the gun that shot the fatal bullet, and that O'Neal had lied about reaming out the barrel to disguise the gun. And finally, there is O'Neal's own testimony about his participation in the murders — that he provided the weapon, the car, and helped murder two people. With the facts of the case, it seems logical to speculate that O'Neal may actually have been free-lancing in the extortion-murder operation, but that when it got hot he fell back on his "special" relationship with the police and fingered his friend Robinson.

Improper Government Actions In Hampton Suit. The government's handling of O'Neal in the Panther lawsuit leads to the conclusion that, for all the rhetoric of reform which comes out of the Department of Justice, little has changed. When initially ordered to produce O'Neal as a witness, the government claimed that they could not locate

him. It was not until a former U.S. Attorney named Sheldon Waxman — who had been in a position to know — publicly announced that the Bureau's excuses were absurd that the government thought better of its ploy and announced only a few days later that they had managed to find O'Neal. When he appeared for deposition in 1974, he testified that his only motive as an informer was the money (he had been paid more than $30,000); but by the time he took the stand in December 1976, he revised his position and told the jury that his true motive all along had been his interest in law enforcement. The fact that the government may have coached a potentially very dangerous witness to present a more seemly attitude is interesting but not surprising.

What is surprising is the forthrightness with which the government is currently subsidizing O'Neal's efforts in the *Hampton* lawsuit. Since being named as a defendant in September, 1975, he has been receiving $1080/month as a stipend from the U.S. Marshall's Office, ostensibly because he can't work while the suit is in progress. It has also been revealed that he was paid a "bonus" of $8500[9] between July and December 1976 for attending the trial, although he only started testifying in December. In addition to what seems suspiciously like hush money, two BPP witnesses against O'Neal have sworn out affidavits that he visited them (having apparently been given their locations by the government) and made thinly veiled threats against their testifying.

The Bureaucracy's Response to the Informer Problem

One of the chief functions of the ranking bureacrat is to deal with scandals which the bureacuracy gets itself into, while insuring that it does not lose control over its own affairs. Outgoing Attorney General Levi's guidelines on "Use of Informants in Domestic Security, Organized Crimes, and Other Criminal Investigations" provides such an example. It is a document with the laudable intentions of ending a history of abuses and corruption, but it closes no loopholes, sets up no clear standards that a well-well-intentioned FBI agent could actually use, and installs no mechanism for enforcing its own exhortations.

The guidelines begin well enough, with what has come to be the expected preamble about protecting individual rights, minimizing the use of informers, ensuring that the government is not party to illegal activities, taking special responsibility for the activities of informers. But the preamble also contains what is actually the keynote of the guidelines — a message of no-change in an envelope labelled reform:

> It is useful to formulate in a single document the limitations on the activities of informants and the duties of the FBI with respect to informants, *even though many of these limitations and duties are set forth in individual instructions or recognized in existing practice.* (Emphasis added.)

The first restriction that the guidelines put on informants is that they are now to be used only in "authorized investigations." The definition for what is an "authorized investigations" is found in the Domestic Investigation Guidelines, issued last year.[10] The Domestic Investigation Guidelines, however, did not put any new limits on the authority to conduct investigations. According to the Comptroller General of the United States, ". . . the language in the draft guidelines would not cause any substantial change in the number type of domestic intelligence investigation initiated."[11] Since the speech crimes, (18 U.S.C. §§ 2383-86 — which make it a crime to advocate violent overthrow of the government) are still on the statute books, the government still has a legal pretext for investigating political activities for evidence of political speech crimes. The FBI has not in the past, and need not in the future, pay attention to the Supreme Court's limitations on these laws, which make to possible to get convictions only if the speech actually incites others to overthrow the government. Under the new Informer Guidelines, then, the FBI would not be restrained, for example, from reviving its 1970 order to infiltrate "every Black Student Union and similar group regardless of their past or present involvement in disorders."[12]

Second, the guidelines then provide some new internal regulations for FBI use of informers. But the record shows that the Bureau of Investigation and the Department of Justice are, like all bureaucracies, notoriously poor at self-regulation, in spite of the quantities of paperwork that are generated to that purpose. The guidelines still rely on the judgment of individuals within the FBI, rather than a system of external safeguards.

- In order to ensure that informers will no longer violate the Bill of Rights, the guidelines state in Section A that, for instance "the FBI should weigh . . . the risk that use of an informant . . . may, contrary to instructions, violate individual rights . . . ." In other words, it is still at the discretion of the FBI agent whether it is worthwhile to threaten the rights of citizens. Another element which the FBI is allowed to decide for itself is whether the informant's character makes him or her a worthwhile agent.

- Section B is a response to the record of provocation, violence, and illegal investigative techniques that have been part of the standard operating procedure of informers. Levi's guidelines exhort the FBI to not do such things any more. But, as the uncovering of the FBI's coverups has shown, they were always aware that these things would not be greeted with public approval. There is nothing in the guidelines which would enforce this prohibition — no safeguard system, no process for review, no system of penalties mandated for

encouraging such activities or winking at them — only the official disapproval of a now-previous Attorney General.

• In part C, the guidelines respond to the FBI's having been caught covering up its informants' misdeeds. They first present a flat prohibition against failing to report such crimes to the "appropriate law enforcement or prosecutive authorities"; but then a series of wide-open loopholes are drilled into this regulation. It turns out that the FBI has the option of taking the problem to another office within the Department of Justice instead; DoJ can then decide (based on the agent's recommendation) whether or not it should either notify those authorities and/or discontinue the informer. One of the criteria for making such a decision is the "effect on the FBI investigative activity of notification," a standard which is so vague that it could mean anything at all. Even the vaguest prospect of inconvenience to virtually any FBI interest could be used to protect informer-criminals with an official blessing.

In all, the Informer Guidelines are not only vague, but also cover only three aspects of the problem. Too many specifics are still left unclarified:

• In the SWP lawsuit, on November 1, 1976 FBI Director Kelley testified that the SWP/YSA informers had been ordered to stop reporting to the FBI, but that they did not have to leave the organizations. When asked what specifically would happen if one of these informers offered information to the Bureau anyway, Kelley responded that SACs (Special Agents in Charge) "are to refuse to accept it. As to whether or not this is set out clearly in any of our instructions, I do not recall." The informer guidelines do not cover this question.

• There are still no standards for ensuring the accuracy or relevance of the information collected. The investigation may be carried out under the pretext of a speech crime violation, but the guidelines do nothing to ensure that information about someone's sex life, rather than their political position, fill the files.

• Nor do the guidelines treat the question of what kind of responsibility the Bureau should have in cases such as the Fred Hampton lawsuit. The evidence there leads to the conclusion that O'Neal was engaged in illegal activities by the score, yet the government's sense of responsibility for those actions has not gone so far as assuming liability and settling out of court (such as the decision by Ford to pay damages in the case of Frank Olsen, the man who killed himself after the CIA spiked his Cointreau with LSD.) Instead, the government's efforts have been to exhaust the plaintiffs' resources by dragging out the litigation as long as possible.

• The guidelines don't offer any concrete standards for recruiting its informers either, nor for devising ways of paying them so that they are encouraged to bring in reliable, accurate, objective information rather than something that sells well at HQ.

• Another unresolved question is when the government should be obliged to reveal the identities of informers, particularly in civil suits against the government's practices.

Government Attitude: No Sign of Repentence

The litigation in the Socialist Workers Party Suit[13] has been concentrating so far around the Bureau informants in the Party and its affiliate, the Young Socialists Alliance; the results are a demonstration that neither the government's attitude nor its activities have altered much, in spite of public outcry.

First, the FBI's attitude toward the SWP seems unchanged in spite of the fact that the only fruit of its nearly 40 year investigation of the Party has been to establish a 40 year record of legitimate political activity, a fact which was confirmed again by the congressional intelligence investigations. This has not prevented the government from making assertions in court of some grave (but subtle) threat that the SWP presents. The fact that the Attorney General at last decided to "terminate" (and it is still not clear what, if anything, that means) the investigation, does not seem to have shifted the FBI's official opinion of the SWP. In October 1976, the government offered its interpretation of the AG's termination order. The SWP,

> *by the very nature of its political ideology remains committed to the overthrow of the government by force and violence. The Attorney General's recent termination of that investigation constitutes a frank recognition that the Socialist Workers Part presently lacks the capacity to translate its revolutionary rhetoric into violent action.*[14]

The SWP has been trying to see that this official (if also grudging) termination is followed to its logical conclusion. It has asked what this means about the FBI informers in the Party. In 1974 District Court Judge Thomas P. Griesa, finding no evidence of crimes or violent activity, had ordered the FBI to send no informers to an upcoming SWP convention. However, Supreme Court Justice Thurgood Marshall reversed this order on appeal from the government and allowed the use of spies in the ongoing investigation. What the Party now wants to know is whether, with a termination order from the Attorney General in hand, the spying is now actually ended. The FBI's answer, it seems, has been yes and no.

As of February, there was still no sign of withdrawal by any of those 66 informers posing as bona fide members — not even apparently, the "spaced withdrawal" which the government advocated in order to protect the informers' indentities. In fighting against a court order for withdrawal, the government attorneys have consistently confused the issue. They have repeatedly brought forth the threat of injury or harassment to exposed SWP informers, and since the facts do not support this from the non-violent group, their arguments draw correlations to what might happen to informers of violent groups, such as the National Caucus of Labor Committees (NCLC) or informers in reg-

ular criminal investigations.

The SWP suit has also produced concrete evidence that it is too early to complacently accept government assurances that the illegal actions against the Party by its agents and informers have actually ended. Director Kelley first denied under oath that there had been any burglaries of the SWP. Then the Church Committee's documents revealed that there had been at least 94; Kelley responded that he had not been properly informed by his Bureau, but that it was clear that the last of the burglaries had taken place in 1966 — conveniently past the statute of limitations on prosecution. But then, last summer, it turned out that FBI informer Timothy Redfearn (another informer from the expected mold — a history of criminal activities and psychiatric problems) had burglarized the Denver SWP office on July 7th, carrying off boxes of files, some of which, documents show, ended up in the hands of the FBI field office. All of this took place in spite of the fact that the FBI officials were aware that the SWP suit meant that they had to be extremely cautious.

The SWP case is not the only example of the government's attitude toward continuing the use of informers. In the lawsuits brought by the Alliance to End Repression and the American Civil Liberties Union against police spying in Chicago,[15] the defendants planted informers in the Alliance's litigation team. When evidence of this surfaced, Judge Alfred Y. Kirkland condemned it and enjoined any such further spying. The government's response, however, was to file an appeal to overturn Kirkland's order.

Developing Remedies for the Informer Problem

The basis of a program designed to reform the informer system is simple — the legal situation, which makes the informant an investigative technique which is virtually beyond the regulation of laws, needs to be turned around. The record shows that it is dangerous not to police the police, and the first assumption that must go is that the government can be trusted implicitly. When current court action shows them lying outright, misrepresenting the facts, concealing evidence, and being generally out of control, it is clear that an informer system based on trust did not and will not work.

We have come to think of the Constitution as the first line of defense for civil liberties, but with informers it clearly is not. The "great American vacuum of subconstitutional controls upon police practices has left the . . . impression that the Constitution is our one instrument for keeping the police within the rule of law,"[16] but fortunately there are other alternatives. If the Nixon/Burger Court has difficulty in learning some of the recent lessons of American politics, there is no reason why Congress cannot fashion remedies of its own.

The First Amendment: Intelligence Informers Are Not Innocuous

Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The First Amendment guarantees for political freedom would seem to be a logical place to begin in order to protect the law-abiding from the political spy; as the Media papers show, one of the intentions of a "counterintelligence program" has been to chill political speech. The Supreme Court, however, held in *Laird v. Tatum*, 408 U.S. 1 (1972) that the protections of the First Amendment were very limited and the chilling of speech was very difficult to establish. This suit had been brought to prohibit military intelligence from collecting information from public and semi-public sources on anti-war groups and activists. The Court saw the issue as being whether someone has standing to sue in federal court by merely alleging

> *that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.*

And it found that "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or threat of specific future harm."

The difficulty, then, is to establish that allowing "mere" data-gathering by informers because of activities protected by the First Amendment is never innocuous, with or without specific evidence of harm. Instead, the facts show that infiltration amounts to being a sanction against lawful political activity. First of all, it is a mistake to assume that informers can be controlled and limited, as shown by the numerous FBI burglaries of which Director Kelley was apparently unaware. Second, people have a justifiable fear of what will be done with the information collected, for although it will likely be inaccurate, there is still plentiful risk that it will be disseminated inside and outside the government, threatening jobs and personal relationships. And finally, if FBI informers are voting members of an organization, they influence elections and policy decisions; allowing infiltration means that, even without disruption tactics, the government can decide the political complexion of virtually any group in the country.

Balancing *Laird v. Tatum*, however, the court has held in a number of cases that the public has a right to the privacy of political association; these decisions might serve as the basis for using the First Amendment to restrict informers. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) held that

a governmental requirement to disclose the NAACP membership list would violate the First Amendment, in part because of an expected chilling effect on group members. A series of other cases have come up the same way,[17] and have established that the government cannot get membership information in court. Since informers compile membership lists on the basis of their observations and have also established a pattern of stealing membership lists, the First Amendment may still be useful — not to protect speech from chill, but to protect a collateral right of the privacy of association.

The Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Much of what needs to be said about controlling informers has already been said by the Court in the context of the warrantless wiretap. There is, however, an irony: although the wiretap is a far more passive intrusion than an infiltrated human agent, it is the latter which the Court has decided is not subject to constitutional protections. In the *Keith* case (*U.S. v. U.S. District Court*, 403 U.S. 297 (1972) the court held that a warrant, based on probable cause to believe that there are or were criminal activities, was essential if a domestic wiretap were to be legal:

> *The fourth amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government.*

But when it has dealt with the question of government spies, the Court came out with a blanket exception built on cynicism: "The risk of being . . . betrayed by an informer . . . is the kind of risk we necessarily assume whenever we speak."[18] [*Hoffa v. U.S.*, 385 U.S. 293,302 (1966).]

In spite of its restrictions on warrantless electronic surveillance the Supreme Court has held that tapes from a conversation with an informer carrying a bug can be used as evidence — even when the informer cannot be found for testimony and cross-examination in court. [*U.S. v. White*, 401 U.S. 745 (1971).] No warrant was required.

These decisions fail, at least partly because the cases involved were all criminal prosecutions, to draw the critical distinctions between criminal investigations and political ones. A situation such as the Socialist Workers Party's 40-year surveillance has not yet been brought before the Court.

The government contributes to this lumping together of both the criminal and political investigation, treating them as if the same set of issues and values were present in both. They are not — while we may want criminal activities to be chilled by the knowledge of police informers and the legal consequences, we do not want legitimate political organizations and debate also chilled. If a warrant based on probable cause to believe that criminal activities were underway were required, then politically active citizens would know they could protect themselves from government interference simply by steering clear of criminal activities.

The government has presented a second set of arguments against requiring warrants in political intelligence investigations — national security requirements, they say, make obtaining a warrant a dangerous burden. But they have not been able to offer an example of a plausible threat to national security which would not involve criminal actions,[19] such as espionage, sabotage, or terrorism.

Another part of the problem is that, as the court has left it, the citizen's protection against informers is supposed to be the right to a fair trial if prosecuted:

> *The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."* [Hoffa, supra, at 311.]

But this means that a safeguard which exists to protect people who are indicted for crimes does not exist for people who are being watched because of their First Amendment activities. Since prosecutions ordinarily do not result, there are no judicial remedies.

The reasonable resolution is to pass legislation which would specify that a paid and planted government informer is not to be considered a friend, but a search, and therefore a warrant, issued according to the standards of the Fourth Amendment, is required.

Without warrants, government agencies have carte blanche for spying on Americans:

> *[T]he extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.* [Brinegar v. U.S., *338 U.S. 160, 182 (1949) (Mr. Justice Jackson, dissenting).]*

Warrants provide a number of specific mechanisms for ensuring that basic rights cannot be flagrantly violated. They provide a paper trail and accountability; they can describe precisely what is relevant to the criminal investigation at hand and make it clear that personal and political information is off limits to the government; they can set up procedures for minimizing what is recorded; they offer a countervailing force against the threat of official investigations carried out for personal reasons (Hoover's vendetta against Martin Luther

King, Jr.'s is a prime example); and warrants contain some standard for discontinuing an investigation if no evidence of a crime shows up.

The warrant procedures are not a panacea, however. Warrants are sought in secret by the government, and one-sided presentations can easily be made to sound convincing. Nor have the courts established a record of denying requests for warrants; to a certain extent, they function merely to ensure that police officials recognize that they do not have a blank check for spying. There is also the troublesome question whether standards for warrants can ever be drawn carefully enough to actually limit investigations to crime and protect at the same time all legitimate political activity. And finally, most of the arguments against the constitutionality of wiretaps also apply to informers. With their acknowledged vacuum cleaner effect, everything is swept up and in practice it is impossible to specify the particulars which are sought in such a search. Does this, then, make informers an inherently unreasonable search and seizure?

Reform by Establishing Rights In Court

The Sixth Amendment Right to a Fair Trial

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.

Since criminal trials are supposed to provide a safeguard against informers, the question of whether or not a defendant is to be protected from abuse of informers in their trial preparation inevitably comes up. The answer in *Weatherford v. Bursey*, No. 75-1510, __ U.S. __ (Feb. 22, 1977), is apparently not.

In the espionage case *Coplon v. U.S.*, 89 U.S. App. D.C. 103, 191 F.2d 749 (1951), the court held that wiretapping conversations between the defendant and her lawyer deprived her of her right to counsel and therefore she was entitled to a new trial. And in the government's *amicus curiae* brief in *Weatherford*, it conceded that placing "an informant in the defense camp during a criminal trial" who would then give the prosecution "privileged information pertaining to the defense" would also violate the Sixth Amendment. By the same token, the Court decided in *Massiah v. U.S.*, 377 U.S. 201 (1964) that using a bug-carrying informer to interrogate a defendant after his indictment and without his counsel present constituted a violation of the Sixth Amendment's right to counsel. But in *Weatherford*, the Court gave informers the authority to be present during discussions between defendant and counsel.

Weatherford was a government informer who was arrested along with Bursey as they raided a draft board. Since he was also indicted, Bursey and his attorney did not know until the day of the trial that the codefendant was to be the prosecution's star witness. In the meantime, Weatherford participated in some meetings with Bursey and his lawyer. The Supreme Court reversed the Court of Appeals and held that since the government averred that Weatherford attended the meetings only to maintain his cover and since there was no evidence that he told the prosecution anything he learned about the defense strategy, there was no violation of the Sixth Amendment right to private consultation between attorney and client. The Court accepted the government's explanations as to why Weatherford attended the meetings and why he did not surface as an informer until the day of the trial.

Perhaps the critical statement in the opinion comes when the Court reaffirmed the assumption that the government does not lie, and that prosecutors and law enforcement officials and informers can — in spite of volumnious evidence to the contrary — be trusted.

> *"Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof so great that we must always assume not only that an informant communicates what he learns from an encounter with the defense and his counsel, but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case."* (Slip opinion at 11.)

As Justice Marshall noted in his dissent, "A rule that offers defendants relief only when they can prove "intent" or "disclosure" is, I fear, little better than no rule at all." (At 4.)

The Court also tried to reason its way out of the apparent contradiction in regulating intrusion by wiretap but not intrusion by informant.

> *. . . a fear that some third party may turn out to be a government agent will inhibit attorney-client communication to a lesser degree than the fear that the government is monitoring those communications through electronic eavesdropping, because the former intrusion may be avoided by excluding third parties from defense meetings or refraining from divulging defense strategy when third parties are present at those meetings."* (Slip opinion, at 9, n. 4.)

Marshall in his dissent found this hairsplitting between the two techniques to be less than convincing:

> *When, as here, the third party is an indicted codefendant, exclusion is not practicable; codefendants need to be informed of each other's strategy* . . . . (Slip opinion at 4, n. 2.)

Entrapment

It is a defense against a criminal conviction if it can be successfully argued that the government set a "trap for the unwary innocent." [*Sherman v.*

U.S., 356 U.S. 369, 372 (1958).] Unfortunately, agents provocateur are ingenious and courts are inclined to seeing the trap as having been laid for the unwary criminal, rather than the unwary innocent. Entrapment has been held to occur only when the agent succeeds in getting "an otherwise unwilling person to commit a criminal act." (*Sherman, supra*, at 371.)

Given the record of agents provocateur, Congress needs to clarify what this means in a political context. Most entrapment occurs in victimless crimes, such as narcotics and prostitution, where there are enticements offered. But political *provocation* is not the same as an enticement. Congress needs to control it, not only out of fairness to the unwary (criminal or otherwise), but because the agent provocateur makes the government something tantamount to being an unindicted co-conspirator. Where the government supplies incentive, know-how, and gadgetry for something such as a bombing, it is difficult to argue that there is any kind of compelling state interest justifying it. The Levi Informant Guidelines acknowledge this, but establish no sanctions against the practice; the current regulation on the subject, then, amounts to don't-make-a-scandal rather than don't-provoke-violence.

The Informer Privilege

The government has been making extensive use in court of its pledge of confidentiality given to informers. In domestic security cases, this pledge has been their strongest argument for withholding documents from the plaintiffs in civil suits. In the *Socialist Workers Party* case, the government has contended that if they were forced to reveal the files of SWP informers, those people would be subjected to harassment and physical retaliation, in spite of the fact that the SWP has avoided witchhunting and in its 40 year history has never threatened any of the known informers.

But the most telling argument against this government rationale is contained in the depositions given to the SWP by two surfaced informers, stating that it was the SWP that they trusted and not the FBI:

> *James Nilson: I was afraid of what the FBI would do to me if I didn't have somebody backing me up.*
> *Question: And you turned to the YSA [Young Socialists Alliance] as somebody to back you up?*
> *Nilson: Yes.*[10]

Congress needs to establish special rights in regard to informers for people who have been the victims of questionable programs. There need to be regulations about the government's responsibility to produce documents in court about its informers' activities; there also needs to be some mechanism for ensuring that an informer privilege is not used to conceal information which citizens otherwise have an interest in knowing. In other words, where there appears to have been illegal or improper activities, victims should be notified of what happened and of their rights to sue in court. If even presidential privilege to conceal evidence must be balanced against other values, *U.S. v. Nixon*, 418 U.S. 683, at 706 (1974), then the informer privilege should likewise be subject to some standards.

And again, in this area as others, the government has encouraged the recurrent confusion between criminal and political investigations. In criminal cases, there may well be a plausible threat to the informer, but in non-criminal cases asserting an informer privilege seems to be motivated by a desire to tie up litigation. There are fortunately, a growing number of non-criminal cases where informer files have been ordered released.[21]

Handling of Informers

The way that the FBI and other police instructs its informants is a final area which needs regulation. Since informers may end up with criminal or civil liability for their activities, they are entitled to careful instruction about what they are supposed to do and what they are not allowed to do. Education about standards for entrapment and civil liberties cannot be a solution in and of itself, but it is a necessary step in the right direction. ■

FOOTNOTES

[1]*Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III of the Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. Senate, 94th Cong., 2d Sess., April 23, 1976, p. 229. (The Church Committee Report.)
[2]Ibid., p. 254.
[3]Senate Report No. 1097, 90th cong., 2d Sess. (1968), p. 101.
[4]*New York Times*, March 25, 1971, p. 33, col. 1.
[5]*Supplementary Detailed Staff Reports on Intelligence Activities, op. cit.*, p. 228.
[6]Dershowitz, Alan M., Harvey A. Silvergate, and Jeanne Baker, "The JDL Murder Case: The Informer Was Our Own Client," *Civil Liberties Review*, April/May 1976, p. 59.
[7]The fatal shooting of Black Panthers Fred Hampton and Mark Clark and the wounding of others is the subject of a lawsuit for damages on behalf of Hampton's family and other survivors. *Hampton v. Hanrahan*, No. 70 C 1384 (N.D. Ill.). For a discussion of the evidence which indicates the raid was a political assassination orchestrated by the FBI, see the November 1976 issue of FIRST PRINCIPLES. The facts presented here are drawn from the testimony in that case.
[8]*Supplemental Detailed Staff Reports on Intelligence Activities, op. cit.*, p. 244.
[9]Testimony of William O'Neal, Dec. 1976 and Plaintiffs Exhibit No. WO 26-43, Dec. 17, 1976.
[10]For a discussion of the Domestic Security Investigation Guidelines, see the June 1976 issue of FIRST PRINCIPLES.
[11]Comptroller General of the United States, *Report to the House Committee on the Judiciary, FBI Domestic Intelligence Operations: Their Purpose and Scope: Issues That Need To Be Resolved*, (Washington: U.S. General Accounting Office, 1976) p. 150.
[12]*Supplemental Detailed Staff Reports on Intelligence Ac-*

tivities, op. cit., p. 235.
[14]*Socialist Worker's Party v. Attorney General*, 73 Civ. 3160 (S.D.N.Y.). See also the September 1976 and January 1977 issues of FIRST PRINCIPLES.
[15]*SWP v. Attorney General*, 73 Civ. 3160 (S.D.N.Y.), Government Brief of Oct. 1, 1976, at p. 18.
[16]*Alliance to End Repression v. Rochford*, No. 74 C 3268 (N.D. Ill.) and *American Civil Liberties Union v. City of Chicago*, N. 75 C 3295 (N.D. Ill.).
[17]Amsterdam, Anthony, "Perspectives on the Fourth Amendment," 58 *Minn. L. Rev.* 349; 380 (1974).
[18] *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Pollard v. Roberts*, 393 U.S. 14 (1968); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); and *Talley v. California*, 362 U.S. 60 (1960).
[19]But see Chief Justice Warren's dissenting opinion in *Hoffa v. U.S.*, 385 U.S. 293 (1966). "An invasion of basic rights made possible by prevailing upon friendship with the victim is no less proscribed than an invasion accomplished by force." At 315.
[20]NOTE: "Developments in the Law — The National Security Interest and Civil Liberties," 85 *Harv. L. Rev.* 1130, 1264 (1972).
[21]*SWP v. Attorney General*, 73 Civ. 3160 (S.D.N.Y.) Affidavit of November 3, 1976, p. 2.
[22]*Alliance to End Repression v. Rochford*, No. 74 C 3268 (N.D. Ill.) Memorandum Opinion and Order, March 26, 1976. See the January 1977 issue of FIRST PRINCIPLES.

Book Reviews

Crusaders, Criminals, Crazies: Terror and Terrorism In Our Time

By Frederick J. Hacker (Norton: 1976) 341 pages.

In Frederick Hacker's words, "A specter is haunting the world, the specter of international terrorism." Political violence, certainly not new in the world, has an unprecedented modern dimension. Modern technology and communications give terrorists a global stage and instant access to our consciousness. Our modern arsenal of destruction, including nuclear weapons, are within the reach of terrorist groups, making free-floating bands the equals of sovereigns. Terrorism is a specter that threatens to tear apart both the strong and the fragile, including the fabric of our democratic institutions.

A spate of recent books warn of the danger of modern political terrorism. Hacker's book is different in its perception of the problem. While no friend of the terrorist, Hacker is less concerned with the danger posed by the activities of Black September, the Japanese United Red Army, SLA, FALN, or other terrorist groups (he points out that their combined violence in the world does not compare with the violence in any of our major U.S. cities) than he is with society's tendency to react to the danger with rigid, uncompromising law-and-order solutions. What primarily haunts the author is not the specter of terrorism but the ever present possibility of counter-terrorism, political violence, and intimidation employed by the state to "thwart" terrorism. He contends that repressive measures do not often save victims and usually result in an escalation of terrorist reprisal and violence. From this escalation comes a cure worse than the disease — the creation of a mirror image of terrorism embodied in the institutions of the state. Ultimately we are "protected" from the terrorist by the likes of Idi Amin of Uganda and Somoza of Nicaragua.

In this country, Hacker's thesis has special significance. What our public policy on terrorism should be is intimately connected with the current debate over the future investigative jurisdiction of the FBI and other intelligence agencies. While the FBI itself has been no stranger to the use of violence, disruption, and intimidation against domestic "subversion," the FBI now cites a litany of domestic bombings and other acts of violence to justify maintaining its intelligence arm in order to anticipate and prevent terrorism. The Justice Department Guidelines give the Bureau this authority and the Church Intelligence Committee has recommended that Congress legislate this one "exception" to a flat-out prohibition on FBI domestic intelligence operations. If Hacker is right, this exception may turn out more costly to our civil liberties than previous grants of intelligence authority to the Bureau.

Hacker, in contrast to the FBI approach, advocates making careful definition of the various kinds of terrorism in order to develop rational and flexible responses to the danger. He distinguishes the "crazy" psychopath type like the Alphabet Bomber, whose motivation and demands bear no relationship to reality, from the "criminal" terrorists like the Mafia who act out of self-interest, and both of these from the "crusader" groups who employ intimidation for altruistic reasons. His point is a simple one: society may be able to bribe the criminal but not the dedicated, and it should act accordingly to protect innocent victims and hostages.

The FBI, on the other hand, has refused to make such distinctions and the results have been costly. For example, Hacker is convinced that one reason the FBI took so long to capture the SLA (561 days to capture Patty Hearst) is that they insisted on viewing them as "criminals" instead of a well-or-

ganized, dedicated group with a support network. By the time of the LA shootout, the Bureau and the Los Angeles Police were operating at the other extreme of political "abstraction." The SLA was viewed by the police in terms generated by the rhetoric of the SLA itself — as an "army" directly threatening our "national security." Although outnumbered 500 to 6, the police chose not to wait it out and capture them but to rain firepower on their hideout, killing six of the group and creating martyrs in the process. Hacker cites this as a prime example of the kind of inflexible police response than can prove disastrous for our society.

Hacker recommends that, whenever possible, we negotiate with terrorists in order to save lives. Having negotiated on behalf of governments, Hacker offers his model of using bargaining teams made up of psychiatrists, sociologists, and others besides the police to explore non-violent solutions. He points to successful efforts of this kind in Austria and Canada and contrasts these with the results from the "tough" stand taken by officials at the Munich Olympic Games.

Many governments, including our own, reject his approach in favor of a tough, no negotiation stance. The FBI has publicly opposed this concept of negotiating teams in favor of more guns, police, surveillance, etc. From Hacker's perspective, this official rigidity is ominous, first for the victims caught up in the web of terrorist acts and second for society itself.

From tough measures may come terror. As Hacker reiterates many times, the problem is "terror *and* terrorism" and they grow and feed off one another. Both employ intimidation to gain political ends — the terrorist seeking justice, the terror regime seeking order. Both justify violence as the only conceivable "defensive" response to the other; the terrorist to prevent further injustice to the oppressed, the terror regime to combat terrorism. They adopt each other's style of operation — extra-legal and para-military. As terror emerges at the top, it has its definitive counterparts to the terrorists from below: "crazies" like Idi Amin, "criminals" like Trujillo, and "crusaders" like Peron.

Can it happen here? Hacker is worried by the public mood, the growing demands for "law and order" and by our recent history of responding to every threat of possible disorder with extra-legal police measures. With Watergate and the intelligence agency abuses clearly in mind, Hacker warns that:

> Even in democratic societies, counterterrorist activities can, by use of electronic surveillance, clandestine infiltration, illegal searches, and similar activities, compound the violation of the values they intend (or pretend) to protect. Inadvertently or by design, counterterrorist campaigns often adopt the tactics they presumably abhor and for the sake of efficiency become as terroristic as the activities against which they fight.

In Hacker's view, these measures not only can lead to terror from the state but they produce the circumstances that generate the terrorist activity they are designed to thwart. America, he contends, has been relatively free of political terrorism not because of its police but "because U.S. institutions for conflict resolution and justice redress, available to everyone, were believed to be working by and large in a satisfactory manner."

Using Hacker's frame of analysis, we must seriously question the wisdom of making the FBI and other intelligence agencies the first line of defense against terrorism. Creating the conditions for terror and terrorism was exactly what the FBI was doing in its extra-legal war on subversives and in its effort to prevent violence in the 1960's. FBI programs of surveillance, infiltration, and disruption contributed in part to the climate of paranoia and hostility in this country that finally resulted in ghetto violence and the emergence of the Weather Underground. Then the FBI turned to violence and illegal methods in the name of "national security" to counter the violence it had helped to generate. For example — the Bureau provoked violence between the Panthers and other black nationalist groups and set up the violence between the Panthers and local police, resulting in the murder of Fred Hampton in Chicago and uncounted other black leaders. The FBI burglarized the homes of friends and relatives of the Weather Underground to gather evidence of fugitives whereabouts. And massive dossiers were compiled on lawful political groups like the Institute for Policy Studies (the object of over fifty FBI informants) on the FBI's speculation that they might be in contact with terrorists.

This record suggests that our developing public policy toward terrorism needs to be closely watched and studied. The use of violence by the government must be considered a last resort. The role of the police must be carefully delineated, and alternatives, like the negotiating teams recommended by Hacker, must be explored and tested. Thought must be given to various ways to counteract terrorist manipulation of the media without sacrificing freedom of the press. The need for strong gun control can not be ignored, neither can the need to find alternatives to nuclear energy since the risk of nuclear theft is so great. Finally, the real challenge, as Hacker states, is to deal with the problems of race and poverty that cause people to resort in desperation to political violence. That is the only real solution.

In sum we need to explore a range of options before we turn to the FBI to protect us. For forty years, America was haunted by the specter of international communism. As we know, the threat of that enemy triggered first an open witch hunt and then a secret intelligence war aimed at disrupting and discrediting the lawful political activity of anyone who vaguely sympathized with left political causes. The specter of international terrorism poses a similar danger, and Hacker's book is extremely important because it forces us to ask the right questions about the survivability of our democratic institutions in this age of political intimidation.

Jerry J. Berman
Director, Project on Domestic Surveillance, CNSS

In The Literature

Articles

"The CIA in Europe: With Allies Like Us, Who Needs Enemies?" by Philip Agee and Steve Weissman, *Oui*, January 1977, page 54. According to Agee and Weissman, the CIA has made Western Europe its second home.

Model Legislation

Law to Control the FBI. Comprehensive model legislation which would prohibit FBI covert intelligence activities, repeal speech crimes, limit the FBI's investigation of private records, and abolish the FBI's Domestic Intelligence Division. The project was sponsored by the Committee for Public Justice, ACLU, and CNSS. Copies available from the Committee for Public Justice, 22 E. 40th St., New York City 10016.

Government Publications

Study on Federal Regulation, Committee on Government Operations, United States Senate, Volume I, "The Regulatory Appointments Process," January 1977: GPO. The report criticizes the manner in which the FBI conducts background checks on some presidential nominees and said that the process is in "need of complete re-evaluation."

FBI Oversight, Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 94th Cong., 1st and 2nd Sess. May 13, 1976, GPO 1976.

Notification to Victims of Improper Intelligence Agency Activities, Hearings Before a subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., 2nd Sess. April 28 and May 11, 1976.

Report of the Department of Justice Task Force to Review the FBI Martin Luther King, Jr., Security and Assassination Investigations, January 11, 1977, 149 pp., Serial No. 027-000-00487-3 (available from the Government Printing Office). Concludes that the FBI investigation was thorough, that James Earl Ray acted alone, that the FBI was not an accomplice, and that the FBI attempts to destroy King were "clearly improper" but FBI agents involved could not be prosecuted because of the statute of limitations.

New Documents Available *from the Center for National Security Studies Library*

Red Squad Activities in Chicago (released 2/9/77). Files released as part of the discovery process in lawsuits filed by the Alliance to End Repression and ACLU. They show that the Chicago Police Intelligence Division surveilled 1.) the Conference's annual conference in Illinois, 2.) their social action board's monthly meetings, 3.) written correspondence of the chairperson of the social action board, 4.) financial transactions of the social action board, 5.) pastoral appointments, and 6.) a meeting of selected church officials.

Justice Department Memoranda Concerning DoJ Access to Information of Other Agencies. Two memoranda dated October 22, 1975 from Deputy Attorney General Tyler concerning cooperation between government agencies on litigation being conducted by the Justice Department.

In The News

Agee Deportation. Philip Agee and Mark Hosenball, a former CIA officer and American journalist, have both been ordered out of Britain as security risks. Neither Agee nor Hosenball have ever been told of the specific charges against them. The original deportation order issued against Agee here last November said that Agee had "maintained regular contacts harmful to the security of the United Kingdom" and "disseminated information" that hurt British security. (*Washington Post*, 2/17/77 p. 23)

CIA/Africa. According to columnists Evans and Novak, CIA payments amounting to "tens of millions" have been given to Israel's intelligence services for use in penetrating the independent states of black Africa. (*Washington Post*, 2/24/77, p. 21)

CIA/CHAOS. Documents declassified but under a court protective order in a civil action suit reveal that the CIA made use of friendly foreign intelligence agencies to gather information on Americans overseas, as part of CIA's domestic spying program called Operation CHAOS. The documents show that the Agency not only requested foreign agencies to spy on, wiretap, and steal documents from Americans overseas, but indicated interest on the part of the CIA to use foreign agents to infiltrate American organizations both overseas and domestically. *See In The Courts.* (*New York Times*, 2/22/77, p. 1)

CIA/Kennedy Assassination. According to a CIA document released under the Freedom of Information Act, in 1967 the CIA directed its offices around the world to "employ propaganda assets" to provide material for countering and discrediting the critics of the Warren Commission's investigation into the assassination of President Kennedy. (*New York Times*, 2/6/77, p. 27)

CIA/New Director. Adm. Stansfield Turner, who was approved as the new Director of Central Intelligence on Feb. 24th, testified before the Senate Select Committee on Intelligence on Feb. 22nd that he would keep the committee promptly informed of covert operations by the CIA, and that he believed it would be useful if more rather than fewer members of Congress were briefed on general issues of intelligence. Adm. Turner, in his prepared statement, said he would insure that the intelligence work "is conducted lawfully." At the same time, President Carter told a group of congressional leaders that he had cut down the number of White House Officials with access to intelligence secrets from 40 to 5, and that he was concerned that too many members of Congress had access to intelligence secrets. He also testified that he would be "very amenable" to legislation making it a crime for CIA officials to make unauthorized disclosures. (*Washington Post*, 2/23/77, p. A2 and *New York Times*, 2/23/77, p. 13)

CIA/Payments to Foreign Leaders. The CIA has been making annual secret payments to King Hussein of Jordan for the past 20 years, including $750,000 last year. As justification for the direct payments, the CIA claimed that Hussein was allowing U.S. intelligence agencies to operate freely in the Middle East. (*Washington Post*, 2/18/77, p. 1)

CIA/Payments to Foreign Leaders. In addition to secret payments to King Hussein of Jordan, the CIA has given such funds to other foreign leaders, including Presidents Chiang Kai-shek of Taiwan, Ramon Magsaysay of the Philippines, Syngman Rhee of South Korea, Sese Seko Mobutu of Zaire, Eduardo Frei Montalvo of Chile, Ngo Dinh Diem of South Vietnam, Luis Echeverria Alvarez of Mexico, Carlos Perez of Venezuela, Gen. Phao Sryanond of Thailand, and Holden Roberto of Angola. (*New York Times*, 2/19/77, p. 9)

CIA/Payments to Foreign Leaders. February 22, 1977: President Carter told Congressional leaders that there were CIA payments to King Hussein, a fact he has declined to confirm to the public. According to one Congressional source, former CIA Director Bush informed the Senate Intelligence Committee of the payments "some time ago," and had encountered no opposition there. In addition, Carter told members of Congress that he had asked for 24 hours notice on the publication of the article exposing the cash payments, that he had invited *Washington Post* editor Ben Bradlee and reporter Bob Woodward to the White House to explain the potential impact of printing the article at that time. (*New York Times*, 2/26/77, p. 1)

CIA/Payments to Foreign Leaders. Sec. of State Cyrus R. Vance described the practice of channeling secret funds to foreign leaders through the CIA as being "appropriate." (*New York Times*, 2/28/77, p. 1)

CIA/Perjury. Justice Department sources disclosed that there were legitimate national security questions at issue in the grand jury investigation of perjury by former CIA director Richard Helms, but that Attorney General Bell has not decided whether they were serious enough to prevent seeking an indictment. A report in the Wilmington Sunday News Journal stated one reason for the supposed delay on the decision was that Helms has told former colleagues in the CIA that if indicted, he would testify that Henry Kissinger told him to lie. (*New York Times*, 2/15/77, p. 15)

CIA/President's Attitude. During his second major press conference, President Carter announced that having reviewed the more controversial activities of the CIA, he has not found "anything illegal or improper." (*New York Times*, 2/24/77, p. 1)

FBI/New Director. February 17, 1977: Attorney General Griffin Bell named a 9-member search committee for a new FBI director. Present FBI Director Clarence Kelley, him-

self a member of the search committee, will remain with the Bureau through October. Other members of the committee are Irving Shapiro (chairman), Susie Marshall Sharp, F.A.O. Schwartz, Cruz Reynoso, Mary Wall, Joseph Timilty, Thomas Bradley, and Charles Morgan, Jr.

FBI/Non-Prosecution of Intelligence Crimes. February 9, 1977: FBI Director Clarence Kelley praised the Justice Department's decision not to prosecute agents of the CIA for illegal mail opening. Last month's Justice Department Report argued that the state of the law prevailing at the time of the mail openings was different from today, an argument being used now by FBI lawyers against indictments for FBI burglaries, wiretapping, and mail openings in the New York area. (*Washington Post*, 2/10/77, p. 13)

FBI/Non-Prosecution. Andrew Decker, Assistant FBI Director, has been absolved of any wrongdoing and reinstated as head of the Records Management Division according to a story in the *Washington Star*. Decker was part of the chain of command in the Bureau that allegedly authorized and supervised the illegal break-ins. (*Washington Star*, 2/16/77, p. 1)

FBI/Ongoing Surveillance. According to the *New York Times*, Chairman Daniel Inouye of the Senate Intelligence Committee authorized the FBI to selectively monitor the contacts of the members and staff of the Committee. Inouye announced the surveillance in a closed meeting of the Committee; he later denied to the *Times* that there had been surveillance but talked in terms of "preventive protection." (*New York Times*, 2/26/77, p. 1)

FBI/Women's Movement. In response to a Freedom of Information Act request, the FBI turned over 1377 pages of files on the Women's movement, which show a four year investigation by the Bureau. Former FBI Director Hoover continued the investigation over the objections of some of his staff. (*Washington Post*, 2/6/77, p. 1)

Government Secrecy/Congressional Access to Intelligence Documents. February 23, 1977: Speaker of the House Thomas O'Neill, in response to President Carter's appeal to Congress to curb access to intelligence operations, told newsmen he favored establishment of a new House Intelligence Committee, and was looking into ways of cutting down access of House members to such operations of the CIA. (*New York Times*, 2/24/77)

Government Secrecy/State Department. Chief Archivist of the U.S., James Rhoads, has sent a letter to former Sec'y. of State Henry Kissinger, requesting that he reverse his decision to keep all transcripts of telephone conversations as his personal property. The General Counsel of the General Services Administration has recommended that the Justice Department be brought into the case if Kissinger rejects Rhoad's request. (*Washington Post*, 2/16/77, p. C5)

Intelligence Community Coordinating Staff. The intelligence community staff, established to provide support to the CIA director in his managerial role in charge of all the intelligence agencies, has grown from fewer than 100 in 1975 to 163 when George Bush was appointed. Ford's proposed 1978 budget for the coordinating bureaucracy is set at $10.5 million, with a staff of 222 people. The military presence on the staff will increase from two to fifteen, stemming partly from criticism by the Pentagon that the staff was a "captive of the CIA." (*Washington Post*, 2/15/77, p. 6)

Lawsuits Against Intelligence Officials. The Department of Justice has paid private lawyers almost $800,000 to represent present and former government officials in civil suits stemming from government spying activities. The Department has hired at least 24 lawyers to represent some 45 present and former officials in 10 lawsuits, and has requested a supplemental appropriation of $4.8 million from Congress to pay the private attorneys. (*New York Times*, 2/4/77, p. A11, and *Washington Post*, 2/6/77, p. A2)

Letelier Assassination. According to evidence being uncovered in the Orlando Letelier assassination case, the murder of the former Chilean Ambassador to the U.S. was carried out by anti-Castro Cubans who were being directed by persons in Chile. Within the past two weeks, at least 6 members of a Miami-based group of Cuban veterans of the Bay of Pigs have been called as witnesses before a federal grand jury. Orlando Bosch, head of a right-wing anti-Castro umbrella organization known as CORU is also wanted for questioning in the case, but attempts to interview him in Venezuela, where he is being detained in connection with the bombing of a Cuban airplane, have been thwarted by the Venezuelan government. (*Washington Post*, 2/1/77, p. 1)

Letelier Assassination. Following U.S. investigations into the assassination of former Chilean Foreign Minister Orlando Letelier, a memo signed by Chile's secret police has surfaced in Mexico that requests $600,000 for, among other things, "the neutralization of the principal opponents of the government junta abroad, especially in Mexico, Argentina, Costa Rica, United States, France and Italy." (*Washington Post*, 2/4/77, p. 18)

Military Intelligence. A document apparently stolen from the office of Adm. Arleigh A. Burke, retired Chief of Naval Operations, has ended up in Naval intelligence files. The document, which is a 1963 interview between a Greek journalist and Burke, was released under the Freedom of Information Act. The Senate Intelligence Committee has requested the CIA and the Defense Intelligence Agency for any information they might have on the possible break-in of Burke's offices, which occurred in 1963. (*New York Times*, 2/6/77, p. 19)

Military Unions. February 7, 1977. According to a survey of Air Force personnel, 35% of enlisted people and 16% of the officers polled would join a military union if given the opportunity. The American Federation of Government Employees voted in September to amend its constitution to admit active military personnel into the union. David Cortright, an associate at CNSS who works on this issue, said that military unions would help prevent future undeclared wars like Vietnam, but would not be inhibiting during declared wars. (*Washington Post*, 2/8/77, p. A1)

Wiretapping/Ongoing. Attorney General Griffin Bell announced that he has approved 12 telephone surveillances and one microphone surveillance since he took office. According to Bell, all the approvals were extensions of surveillances from the Ford Administration and that no American citizen is the subject of warrantless electronic surveillance. (DoJ Press Release, 2/11/77)

Terrorism. A year-long study by the Nuclear Regulatory Commission has concluded that the possibility of terrorism against the 74 civilian-operated nuclear facilities requires an immediate and significant increase in security, not because of the "imminence of threat", but because of the need for a "prudent level of protection." (*New York Times*, 2/20/77, p. 1)

In The Courts

Classified Information in Court Proceedings, *U.S. v. Grunden*, U.S.C.M.A. No. 31,643 (Feb. 18, 1977). Noting that "the simple utilization of the terms 'security' or 'military necessity' cannot be the talisman in whose presence the protection of the Sixth Amendment and its guarantee to a public trial must vanish" and that "the mere uniqueness of the military society or military necessity cannot be urged as a basis for sustaining that which reason and analysis indicate is untenable" the U.S. Court of Military Appeals reversed a conviction for espionage because "the trial judge employed an axe in place of the constitutionally required scapel" in closing the trial to prevent disclosure of classified information.

Gag Order. *Halkins v. Helms*, No. 75-1773 (D.D.C., Feb. 14, 1977) (Protective Order). In a suit against the CIA, NSA, and others for damages for illegal surveillance, the government released on Dec. 30th documents which related to the CIA's Operation CHAOS and which were not at that time covered by a protective order. Shortly thereafter, the defendants expressed disapproval of plaintiff's intention to release the information to the public, calling it "an extrajudicial use of these documents." On January 28th, Judge June Green's chambers called, asking that the documents not be released as planned, and on January 31st the government filed a Motion for a Protective Order, which was granted February 14, 1977.

Search Warrant Requirements. *U.S. v. Ford*, No. 76-1467 (D.C. Cir., Feb. 11, 1977). The Court of Appeals ruled that a search warrant was invalid which did not specify how the entry planting a bug was to be made or how many entries were to be permissible. The fact that these details were discussed between the prosecutor and the judge did not satisfy the requirements of a warrant.

Surveillance Lawsuits. *Lee v. Kelley*, No. 76-1185 (D.D.C., Jan. 31, 1977) (Opinion and Order). Judge John Lewis Smith, Jr. dismissed two civil suits against the FBI for illegal surveillance which were brought by former associates of Martin Luther King, Jr. The court held that since there were press accounts during the 1960's of a King surveillance, the Statute of Limitations ran out before the official confirmation in 1975 by the Church Committee.

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gence activities. The President has restricted access in the executive branch and called on Congress to follow suit.

Even for the most cynical White House watchers it is difficult to believe how fast the wagons are being drawn around the inner circle in response to the first leaks. Henry Kissinger once told a congressional committee that a new administration tends to greatly exaggerate the cost of leaks and to concentrate its energy on a futile effort to prevent them. That paranoia led to wiretaps, and making policy in extreme secrecy. One hoped that at least *that* lesson had been learned.

Control of information related to national security exists in a posture of almost complete lawlessness and anarchy. There are no laws regulating what must be released and what can be kept secret, or even establishing procedures for determining how those decisions should be made. The Executive Order is extremely vague and grants great discretion to officials without requiring them to take the public's right to know into account. Given such a system leaks are inevitable. Indeed, without them we would know very little about what our government is doing abroad in our name.

Legislation is urgently needed not only to strip away the secrecy which would permit future abuses and which interfere with the working of the constitutional system, but also to prevent abuses of the present and to redress the outrages of the past.

Not a single law has been changed since we learned of the illegal and unconstitutional acts of the past. Can anyone who believes in the rule of law really believe that the matter can be fixed by administrative reforms and executive orders? The CIA operates on college campuses in a manner which the Church Committee said threatened academic freedom in America. Were these activities included in the review of CIA operations which President Carter says uncovered no improprieties? If not the review was obviously incomplete; if so then we cannot leave those judgments to be made secretly by the administration.

Nor can the abuses of the past be remedied by the new DCI's codewords about rebuilding agency morale. The CIA still has many files gathered in violation of its charter and of the constitution; so do many other intelligence agencies. At the very least, these files must be purged. Individuals who were investigated and manipulated by the intelligence agencies have a right to be informed and to receive their files. Intelligence agency officials who violated the criminal laws should be investigated and, where the evidence warrants, indicted.

None of this will improve the reputation of the intelligence agencies in the short run. But in the long run, a thorough hearing and cleansing is the only way to have an intelligence community whose reputation is deservedly high, whose morale is good, and which is functioning under the constitution. ■

Point Of View

(continued from page 16)

First Principles
is published by the
Project on National
Security and Civil
Liberties, which is
sponsored by the
American Civil Liberties
Union Foundation and the
Center for National
Security Studies of the
Fund for peace.

122 Maryland Avenue, N.E., Washington, D.C. 20002
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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON, MAY 13, 1798

Point of View

Improving Morale

MORTON H. HALPERIN

Washington lives by codewords. There are, for instance, slogans which sound like simple truisms but which actually signal which way someone intends to go.

For those concerned about reforming the intelligence agencies, the key sentence in Admiral Stansfield Turner's opening statement in his confirmation hearings before the Senate Intelligence Committee was this:

> Even though the various disclosures of questionable intelligence activities during the past several years were necessary, they have damaged the public reputation of the intelligence community.

In case any one missed which element — a damaged reputation or a history of lawlessness — was the code word, Admiral Turner went on to commit himself to rebuilding that reputation.

His commitment was not to try to undo (as much as possible) the damage done in the past, or to eliminating ongoing actions which violate the CIA charter, or to creating legislation to prevent future abuses when men and women not as honorable as those now in high office come to power. No — his major goal is to rebuild the image of the intelligence agencies in the society.

When Attorney General Edward Levi came into office in the Ford Administration he made a similar pledge to restore the morale of career officials of the intelligence agencies. No one could have had any doubt about what that meant. To take just one example, the Justice Department under Mr. Levi found one reason after another not to indict anyone for the crimes carried out by officials of the intelligence agencies. Indictments for mail openings, wiretaps, or burglaries, do not, after all, restore morale.

So no one should misunderstand Admiral Turner's meaning either. In the same statement he reported that President Carter had concluded that there was no need for legislation to regulate the conduct of the intelligence agencies; existing laws and executive orders were said to be sufficient.

Meanwhile, President Carter has told us that he has concluded a review of all current covert operations and found no improprieties. The only problem he seems to have uncovered is that too many people in the White House and the Congress have access to information about intelli-

Collective Impressions Printshop
Typesetting by
Unicorn Graphics,
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